No. 3196

United States Circuit Court of Appeals

For the Ninth Circuit

JULIUS RHUBERG
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA
Defendant in Error

Petition of Plaintiff in Error for Rehearing

Upon Writ of Error to the United States District Court for the District of Oregon

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To the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit:

Julius Rhuberg, the plaintiff in error, respectfully presents this, his petition for a rehearing in the above entitled cause, with a statement of the grounds thereof.

This petition for rehearing is urged by the plaintiff in error, because he feels that the court has

misread the record in the case, and because of the interpretation placed by the court upon Section 3 of the Act of June 15, 1917, known as the Espionage Act.

The decision in affirming the judgment of the lower court is based upon the belief that the record contained evidence of statements made by Rhuberg to Davis after we entered the war, and after the passage of the Espionage Act, which had the effect upon Davis claimed by this court, and upon the further fact that the Act does not require proof of the actual obstruction by the defendant of the recruiting or enlistment service of the United States.

MISTAKE OF FACT.

On page 10 of the opinion, this court says: "The loyalty of Davis to the Government and his spirit of patriotism was clearly diverted and obstructed by the defendant's statement that 'we had no business in the war, no call whatever to be in the war,' and his advice to witness 'not to enlist, not to get into the army until after he was drafted'; all this had its effect upon Davis, and it was not until after he had talked with other people that he came back to his true course."

This court must concede that statements made to Davis by Rhuberg *prior* to the enactment of the Espionage Act of June 15, 1917, regardless of the immediate or after effect thereof, will never support a conviction for violation of that Act. In other words, the Espionage Act can have no *retroactive* force. It cannot be given *ex post facto* effect.

This being true, there can be found in the record of this cause *absolutely no evidence* of statements made by Rhuberg to Davis *after* the passage of the Espionage Act, or even after we entered the war, and prior to the Act becoming a law, which are shown to have had the effect on Davis claimed by this court, or any effect whatsoever.

Davis himself says (pages 54-55, T. of R.), that while his conversation had with Rhuberg *prior* to our entering into the war had the effect "to cause,"

etc., the effect upon him of any such conversation *after we entered* the war (April 6, 1917, and months before the enactment of the Espionage Law), was *totally different.* The whole of his direct examination upon this point is embraced in the following questions and answers: (Page 55, T. of R.)

"Q. Now, what effect did the conversations of Rhuberg have with you *subsequent to our entrance into the war?*

A. *It didn't have much of any, that didn't.*

Q. What was the reason of the change?

A. Well, other people talked to me, different people around. I quit visiting Borstels, and other people got talking to me, and I got it out of my head; it put me to thinking."

And on cross-examination: (Page 57, T. of R.)

"Q. Now, these statements that he made to you that you speak of, after we came into the war, they didn't influence you in any way, or deter you from enlistment, did they?

A. No, sir; they didn't keep me from enlisting, but still it made me feel bad.

Q. You hadn't intended or expected to enlist, had you?

A. No, sir.

Q. Nothing he said influenced you in the matter, or changed your intentions in any way as regards going into the service?

A. Well, *if I hadn't been married*, it probably would have.

Q. But you were married?

A. I was, yes.

Q. And had no intention of going until you had to?

A. No, sir.

Q. The *only reason* you didn't go *was because of your wife and your baby?*

A. *Yes, sir.*"

It is clear from the statements of Davis above quoted that the change of his opinions which came about, came *before* our entry into this war. What in effect he says is, that before April 6, 1917, he had quit visiting the von Borstels and talked with people holding views differing from those he claimed were expressed by Rhuberg, to such an extent that any conversation had with Rhuberg "subsequent to our entry into the war" had *no effect* upon him.

What then, if "the loyalty of Davis to the Government and his spirit of patriotism was clearly diverted and obstructed." Upon the record, this occurred not only *prior to the passage of the Espionage Act*, but *prior even to the entry of our country into the war;* at a time when it was not only legal, but when organized effort was being openly made to create sentiment favorable to and against the entry of this country into the European War.

There is no statement made by Rhuberg to any person other than the one witness, Davis, which can be looked to to support his unwarranted conviction. There is manifestly nothing said to Davis *after* our entry into the war, and *after* the Act of June 15, 1917, which in any degree whatever supports or even seems to support the verdict of the jury. It is not sufficient to say that the verdict of the jury was against petitioner. Unless the law heretofore for centuries governing in criminal procedure is to be wholly abandoned in an effort to support unwarranted conviction in espionage cases, there *must* be evidence adduced to support the jury's verdict. The Government has wholly failed to adduce any evidence to justify or support it. The record, wholly lacking as it does any such evidence, would, in any other than an *espionage* case, have resulted in an acquittal by the trial jury. The appeal to this Honorable Court is from a conviction by a jury moved, not by *evidence of guilt,* but by intense feeling against anything savoring of disloyalty to this Government. It was a conviction *despite* evidence of the Governments' own witness of the innocence of the defendant. The appeal to this court of this petitioner from such a conviction should not prove a vain and useless effort to receive that justice to which even an alien enemy is entitled.

MISTAKE OF LAW.

It was contended in this cause by plaintiff in error that there must have resulted from his statements made after June 15, 1917, some injury to the recruiting or enlistment service of the United States, and that since the Government had not shown that such statements did in fact result in any injury, either to the recruiting or enlistment service of the United States, or to the United States, he should have been granted a directed verdict.

This court in reply to this argument said, "The question whether the statements of the defendant did result in an obstruction to the recruiting or enlistment service to the United States was clearly a question of fact to be determined by the jury from all the surrounding circumstances and reasonable inferences to be drawn from established facts under proper instructions from the court."

Conceding only for the sake of our argument that this is a correct statement of a legal principle, we ask: *"Is there not a further principle of law that, before a jury can find that a fact exists, it must have some evidence on which to base such findings of fact?"*

The trial jury in this case had no such evidence before it for the best of reasons: The record contains no such evidence. We can even make this important statement more emphatic. Not only did

this record contain no evidence of injury to the recruiting or enlistment service of the United States, but it goes further. The record contains *positive and conclusive evidence that such injury was in fact not done.* Luther Davis testified that nothing Rhuberg had said to him influenced or deterred him from enlisting (T. of R., p. 57). Luther Davis was the sole individual to whom the statements for the making of which Rhuberg was convicted were made. The Government evidently recognized Davis was speaking the truth. He was their principal witness, and no attempt whatever was made by them to impeach his testimony. Furthermore, there is no proof that Luther Davis communicated the statements to anyone else (see Bulletin 85, page 3).

In order, therefore, for this court to invoke the principle set forth above, it is necessary to say that there was evidence before the jury that an obstruction had been consummated. The record discloses that the only evidence before the jury was the unimpeached statement of Davis denying the obstruction. To find that obstruction occurred, it would have been necessary for the jury to have either ignored the testimony of Davis, or believed he perjured himself. We respectfully submit that when one's liberty is in the balance a conviction founded on such a conclusion should never be affirmed.

Rule of Probable or Natural Inference Not Applicable.

But this court will answer by saying that the jury could have determined from all the surrounding circumstances and reasonable inferences to be drawn from the established facts in the case, that obstruction actually resulted (Opinion, p. 8), and in this reply is found the principal error on which we base our petition for re-hearing.

A careful reading of the instructions reported in the various Bulletins cited by this court on page 10 of its Opinion discloses an uniformly similar interpretation of this phase of Section 3 of the Espionage Act. Various District Judges have instructed juries that if they believed that the natural and probable consequences of such statements upon the minds of the individuals hearing them was to obstruct the recruiting and enlistment service of the United States they should convict, even though the Government had neglected to prove that some particular individuals had been deterred from enlisting.

We recognize that there undoubtedly have been cases where such an interpretation might be correct, as in cases of the publication of a statement in a newspaper of general circulation, or an address made at a public gathering, there being among those addressed a large number of young men within the draft age. In either case it might very plausibly

be argued that the Government need only prove that the remarks or statements were made and made wilfully, and then it would rest with the jury to determine whether the natural and probable consequences of such statements would be that recruiting and enlistment among some of the young men who read or heard the statements might be obstructed.

Irrespective of the correctness of such an interpretation of the Act of June 15, 1917, we emphatically maintain that it has no applicability to the Rhuberg case. Rhuberg made no written statement. Rhuberg addressed no gathering. Rhuberg was in his own home, on the Mackin ranch, attending to his own business. Davis called on him there. Davis was alone. The statements were made. Davis said they did not deter him from enlisting. Davis went further. He explained that the *only* reason he had for not having enlisted was that he was married and had a baby. In the face of such evidence, was there any reason or necessity for seeking to determine the natural and probable consequences of Rhuberg's statements? Since when has inference, natural or probable, become better evidence than clear, unequivocal, unimpeached statements of affirmative fact?

Had there been one, two, or three other men of draft age present; had Davis testified merely to the making and the nature of the statements,

and nothing had been said as to the effect, either in the direct or the cross-examination, then we concede that the above rule of interpretation might be relied upon. In the Rhuberg case, however, Davis alone was present. Davis has denied that the remarks deterred him from enlisting. Davis makes a most natural and a most complete explanation as to why he did not enlist. Davis was not impeached. Should a jury be permitted to substitute in the place of such conclusive and uncontradicted affirmative statements and circumstances, inferences either natural or probable?

With Davis alone present and with Davis testifying that nothing Rhuberg said had had any effect, then it is as though Rhuberg had never spoken; it is as though Rhuberg, while standing on a hillside in Eastern Oregon attending his sheep, had directed his remarks to the surrounding space; it is as though Rhuberg had withdrawn to the privacy of his room and there given vent to his own private opinions. In the final analysis this is in effect what Rhuberg actually did.

Since these are the facts in Rhuberg's case, we maintain his conviction should be set aside as quickly as it would have been had it been based on any one of the three instances set forth above.

A careful reading, therefore, of the Bulletins cited in the Opinion wherein they say it is not necessary for the Government to show that some

particular person was induced not to enlist, produces this conclusion: Where the defendant makes the statement to two or more individuals within the draft age and the Government proves the statements by one of these individuals, admission by that individual that he was not deterred from enlisting by reason thereof, would not be a complete defense, for the simple reason, that the same remarks might have prevented the others who were also present from enlisting. The jury would not be required to infer that, because the remarks had no effect upon the man testifying, they likewise had no effect upon all those to whom the remarks had been addressed, or who might have even heard the remarks. If, however, there was, as in our case, but *one individual* present, and that individual testified not only that the statements had had no effect, but gives the most natural and complete reason for not having enlisted, and the Government, by making no attempt whatsoever to impeach or contradict such testimony, apparently accepts it as true, then we submit there is no room for inference, probable or natural, and the rule of interpretation set forth in the opinion of this court is inapplicable; and hence, to that extent, *erroneous*.

Attempt to Obstruct Not Included in Original Complaint.

We contend that at the most Rhuberg was guilty of an attempt to obstruct enlistment, and

that an attempt to obstruct was not made a crime until the Espionage Act was amended on May 18, 1918. (Public 150, 65th Congress.) The original Act read:

> "Whoever . . . shall wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service or of the United States."

The Amended Act reads:

> "Whoever . . . shall wilfully obstruct *or attempt to obstruct* the recruiting or enlistment service of the United States."

This court, however, answers our argument that this and other amendments "were evidently intended to overcome certain technical objections and *enlarge the scope of the statute.*"

We encounter no difficulty in agreeing with the court that the Amended Act certainly *enlarges* the scope of the Act under which Rhuberg was indicted and convicted, in that it makes it an offense to *attempt to obstruct*, whereas in the former Act it merely said "whoever . . . shall wilfully obstruct."

This court, however, in effect finds that while Davis may not have been deterred from enlisting, Rhuberg has nevertheless violated the Act of May 15, 1917. In other words, Rhuberg is guilty of an attempt to obstruct. Here we encounter dif-

ficulty. If the Act under which Rhuberg was indicted and convicted covers "attempts," then *why was it necessary* to "enlarge" it by amending this clause of Section 3?

What Does "Injury to the Service" Mean?

Furthermore, such a construction is not sustained by the statute in question. If the words, "obstruct . . . to the injury of the service" mean what they say, how can it be maintained that the Government should be permitted to rest its case without showing an injury by reason of the particular method of obstruction employed by the defendant. Suppose Doe instituted a civil action against Roe under a statute which provided that "whoever wilfully obstructs a public highway to the injury of pedestrians or others using said highway shall be liable in an action for damages, etc." Would Doe be entitled to a judgment merely by proving, for example, that a log had been placed across the road and then rest his case, relying upon the inference that the natural and probable effect of such an act on the part of Roe was an injury to Doe's property? Doe would have been immediately and very properly non-suited. The words, "to the injury of," when they appear in a statute have a definite well-known meaning. Certainly their presence in a civil statute would make them an essential element in the proof of a case instituted thereon. Why, then, should they have a different

meaning or be entirely ignored when used in the original Espionage Act? If they meant nothing, why did Congress deem it necessary to entirely eliminate them in the Amended Act?

Government Bulletins.

This court cited some twenty-two Bulletins containing cases which, it is maintained, disclosed that various District Judges are in accord with Judge Wolverton's instructions on the lack of any necessity of proving injury, and that the jury may convict if they concluded injury may have naturally or probably resulted from the statements. We comment briefly on these Bulletins.

Bulletin 4, *United States v. Wallace.*

Wallace was indicted on four counts, one for obstructing enlistments. This case is inapplicable in that Wallace's remarks were made where there was a battery of men, either actually enlisted or ready for enlistment. (Page 6.) Judge Wade in his instructions said: "You are to determine the question whether he was trying to restrain enlistment as charged, or words to that effect; or whether he was trying to restrain them from enlisting in the English Army." (Page 7.) In view of the fact that an attempt to obstruct was not made an offense until the Espionage Act was amended by the Act of June 18, 1918, we are surprised that the Bulletin does not disclose a request for an

exception to this phase of the instructions. We also call the court's attention to the second paragraph on page 7 of this Bulletin.

Bulletin 15, *United States v. Pierce.*

Indictment for extensively circulating a pamphlet. This fact alone makes the case inapplicable to the instant case. On page 9, Judge Ray says: "Must the indictment allege and must the Government prove not only that the United States is at war, and that the false reports were made and conveyed with the intent to interfere with the operation or success of the military or naval forces, but that such acts actually resulted either in injury to the service of the United States or were intended so to do? *This is true as to obstructing the recruiting and enlistment service, as the Section so says in plain terms.*" The phrase "plain terms" aptly characterizes the wording of the third clause in Section 3 of the Espionage Act. Because of this characteristic of this clause, we have continuously maintained that it is not subject to the interpretation attempted to be placed upon it by Judge Wolverton or this court.

Bulletin 49, *United States v. O'Hare.*

Indicted for making a speech in presence of 125 people and the same objection as that raised against Bulletin 15 applies here.

Bulletin 53, *United States v. Hipp.*

Indicted on various counts for speaking to

numerous young men. Special attention of this court is invited to pages 5 to 8 wherein among other things Judge Lewis states that under the former Espionage Act Congress "Did not see fit to make it a criminal offense . . . to *attempt to obstruct* the recruiting or enlisment service of the United States."

In defining the word "obstruction" he says: "As used . . . it means . . . to *effectively* resist or oppose . . . to the injury," etc. Effective means successful, complete, *actual.*

Bulletin 55, *United States v. Doe.*

Indicted for writing and mailing circular letters. Referring to the very clause in Section 3 under which Rhuberg is indicted, that court held it was much more fixed and rigid in its fundamental elements than the first two, (page 5), and he likewise used the word "*effective*" in speaking of the character of obstruction.

Bulletin 56, *United States v. Tanner.*

Tanner was indicted on four counts for making statements to various young men on various occasions and hence is inapplicable. Judge Lewis instructed the jury in that case that "obstruct" meant to *effectually* oppose the war, to the injury of the service of the United States. (Page 5.) Particular attention is also called to the last paragraph on page 4, wherein he told the jury that before they would be justified in convicting for obstructing

enlistment "it is necessary that the evidence show beyond a reasonable doubt, that the defendant said the things complained of, or their substance; that he did so wilfully; that the things said as charged *did obstruct* . . . that what was said . . . *caused substantial injury* . . ." and "unless you so find, you will acquit the defendant." We maintain this is a correct statement of the law and yet this court cites the case as an authority in denying our contention which in effect is identical with this instruction.

Bulletin 76, *United States v. Harper.*

Indicted for making statements to *more than one person.* The instruction on page 5 is perhaps correct as there was apparently no evidence of any kind showing that the men were or were not deterred from enlisting.

Bulletin 78, *United States v. Foster.*

Charged with violation of all three clauses of Section 3. In speaking of the count charging the defendant with causing or attempting to cause insubordination, the court said: (Page 3.) "It is not necessary if they did so *attempt*, that they *actually succeeded* in any way." Then later when referring to the 3rd and 6th counts, charging the obstruction of the enlistment service, he said:

> "It would be necessary before you can find the defendants, or any one of them guilty under those counts, that you find that their efforts

have not only *obstructed,* but had been to the *injury* of that service. There must have been the *effect* there that is described in the statute *accomplished to some extent at least,* before you can return a verdict of guilty."

Bulletin 79, *United States v. Waldron.*

Convicted for statements and circulating a pamphlet.

That portion of the instruction beginning at page 7, particularly the repeated use of the past tense of the word "obstruct" certainly does not sustain the interpretation laid down by this court.

Bulletin 81, *United States v. Wolf.*

Indicted for making statements to various young men. Particular attention is called to page 5, wherein Judge Elliott said:

"Congress has made it a criminal offense not only to cause insubordination, disloyalty, mutiny, or refusal of duty, as I have attempted to explain to you, but it said, further, 'to cause or attempt to cause'; that is, the military or naval forces of the United States that are organized. If one causes it or attempts to cause it as to those forces, he is guilty of a criminal offense. When it comes to recruiting or enlistment service of the United States, Congress did not see fit to declare that it is a criminal offense *to attempt to obstruct* that service and that recruiting and enlistment, but

it says 'whoever . . . shall wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service of the United States' shall be guilty of a criminal offense."

If, as contended, Rhuberg at the most is guilty of an attempt, how can this court cite such an instruction in support of his conviction?

The same objection goes to Bulletin 89, *United States v. Kornmann*, page 6.

Bulletin 83, *United States v. Mackley.*
Bulletin 86, *United States v. Hendricksen.*
Bulletin 108, *United States v. Taubert.*
Bulletin 120, *United States v. Graham.*

In all four of these cases the defendants were indicted and convicted for making statements to various young men, and for the reasons herein before set forth are inapplicable to the case at bar.

Bulletin 85, *United States v. Frerich.*

Statements made to a number of young men and Judge Munger among other things instructed the jury:

"It is necessary under the other counts (relating to obstructing enlistment) that the statements were made wilfully and that they were made to obstruct and *did obstruct* the recruiting or enlistment service of the United States *to*

the injury of the service or *to the injury* of the United States."

There is nothing in this instruction authorizing the jury to infer that the statements naturally or probably would have obstructed, but the sole question was, *did they obstruct?* Yet this court cites this case in confirming Rhuberg's conviction.

Bulletin 106, *United States v. Stokes.*

As the court well knows this was an indictment for publishing a letter in the Kansas City Star, a daily newspaper of wide and general circulation, and for reasons hereinbefore given is wholly inapplicable to the present case.

Bulletin 109, *United States v. Herman.*

Convicted for publishing a circular letter and hence likewise not applicable.

Bulletin 122, *United States v. Hitchcock.*

Despite the fact that attempted obstruction was not made an offense until the amendment to the Espionage Act, nevertheless the contrary expression is given on page 13 of this Bulletin.

Federal Court Decisions.

On page 11 of its opinion this court refers to five Federal Court decisions, claimed to show that objections of the same character here presented were passed upon adversely to our contention. They are the following:

The case of *Masses Pub. Co. v. Patten*, 247 Fed. 24, 38, was a suit by the publishing company to restrain the postmaster of New York City from preventing the mailing of a magazine which had a circulation of 20,000 to 25,000. The postmaster had made the order on the ground that the publication violated Section 3 of the Espionage Act of 1917. No question of whether the publishers were guilty of a criminal violation of the Act was involved in this case, and the sole question was whether the magazine could be mailed because it did not in so many words directly advise or counsel a violation of the Act. (Page 37.) The difference between that case and the one now before this court is so manifest as to make further comment unnecessary.

The case of the *United States v. Krafft*, 249 Fed. 919, was an indictment for making statements to a number of men already mustered into the United States Military Service with intent to effect mutiny, etc. The entire case is confined to a totally different phase of the Espionage Act than that under which Rhuberg was convicted.

This case is of interest, however, for the following reasons: Krafft claimed that the Government should not only show he made the statements with intent to cause insubordination, mutiny, etc., but that his words actually produced this result. Circuit Judge Buffington replying to this argument said:

> "Manifestly, Congress had no such purpose in view, nor can the simple and plain words of the Act be given such meaning. In that regard the statute does not specify the writings, speech, or indeed the kind of means to be used; it makes one comprehensive, inclusive crime—whoever when the United States is at war shall cause'. That means actually cause, succeed in causing; that is one crime the statute specifies, and also whoever shall wilfully 'attempt to cause' is put on the same status."

In other words if this clause of the Espionage Act had merely provided, "whoever . . . shall wilfully cause . . . insubordination," etc., it would be necessary to show actual insubordination, for the court says: "That means actually cause, succeed in causing." The including of the words "or attempt to cause" in this same clause of Section 3, according to Judge Buffington, places the court in a position where "there is no ground to construe or apply this statute on the theory that insubordination, mutiny or disloyalty must be effective."

The court realizes that the clause 3 under which Rhuberg was convicted provided that "whoever shall obstruct the enlistment," etc. Not until the following year was the *attempt to obstruct* added to this clause and thereby to use Judge Buffington words, "put in the same status."

No stronger argument for Rhuberg could be desired than this decision of Judge Buffington, which this court cites against Rhuberg.

The case of *Kirchner v. United States*, Bulletin 174, was an indictment for making false statements at Elizabeth, West Virginia, to various persons, and the facts, bringing it under a different clause of Section 3 of the Espionage Act, likewise make this case inapplicable.

In the case of *O'Hare v. United States*, 253 Fed. 538, Miss O'Hare was indicted for delivering an address at a public meeting at Bowman, North Dakota, before an audience of 100 or more people. This is the only one of the five cases cited by this court on page 11 of its opinion which considers an indictment for the making of oral statements, and hence within the same clause of Section 3 on which Rhuberg was convicted. Circuit Judge Hook in refusing to reverse for failure of the trial court to instruct that the Government should show that some particular person was persuaded not to enlist, based his refusal on the ground that under the circumstances and the language used in that case, injury was presumed to have resulted. This is in line with our argument that where an address is made to many people, the person selected by the Government to prove the making of the statements need not show that he was not deterred from enlisting. The jury could infer that any one of the remaining

persons addressed might have been deterred. Moreover, there was substantial proof that the defendant embraced the occasion. Even the Government makes no claim that similar circumstances exist in our case. Rhuberg was at his own ranch, attending to his own business, and Davis sought him out. There were no other people present.

The case of *Doe v. United States,* 253 Fed. 903, is likewise not in point. Doe was convicted for mailing hundreds of circulars which contained statements violative of Section 3. The same objections exist against the citation of this case as an authority in the Rhuberg case as are set forth in our comments on the O'Hare decision.

Bulletin 82, *United States v. Pundt.*

In this case Judge Munger, in speaking of the effect of the statements said: "It should be such as would cause a person to pause and be delayed in reaching a decision to enlist." (Page 4.) This is exactly what we maintain the Rhuberg case fails to disclose. Davis neither paused nor hesitated, nor was he daleyed in enlisting by reason of any statements which Rhuberg made.

Bulletin 90, *United States v. Joseph Zittel.*

Judge Netterer in his instructions to the jury in this case stated: "That defendant should be convicted if it was proved that the act was that of the defendant and he committed the act knowingly,

made the statements with wrongful intent, and that the effect or the result or the consummation of the act had nothing to do with the case." This instruction is so clearly out of harmony with those contained in the remaining Bulletins cited by this court as to require no further comment.

Bulletin 112, *United States v. Windmueller.*

We have read the instructions in this case several times and still do not understand how Windmueller could have been indicted under the Act of June 15, 1917, for statements made on April 7, 1917. A reading of the first page of this Bulletin discloses that the facts and circumstances are totally different from our case. The man to whom the statements were made was actually on his way to enlist in the Signal Corps.

After a careful reading of the Court's Opinion we are forced to the conclusion that this court has confirmed Rhuberg's conviction because, as they say on page 10, "The loyalty of Davis to the Government and his spirit of patriotism were clearly diverted and obstructed by the defendant's statements." The court, from a moment's consideration, will recall that diverting or obstructing loyalty or patriotism is clearly not an offense under Section 3 of the Act under which Rhuberg was indicted and convicted.

We fully appreciate that ordinarily the filing of

a petition for rehearing is but a perfunctory procedure and an imposition on the court. In this case, however, we feel our client is entitled to have the facts set forth in this petition presented to this court.

We believe that if the court will again read the decisions and bulletins cited in their opinion, with the distinctions and comments made thereon in this petition in mind, they will readily perceive how totally inapplicable they are to the facts in the Rhuberg case. Rhuberg wrote no letters. He addressed no public gatherings. He is simply what the record shows him, an old man whose entire life has been spent with his herds and his flocks, in mountain ranges, in sage brush, in wheat fields. Now that the terrible conflict is gradually receding, and people are regaining their normal perspective, they are beginning to realize that the Espionage Act, while it was unquestionably a most salutory law, was never intended to cover a case of the character of this whole matter. Were he to come to trial today and the facts in his case presented to the jury, we know he would walk forth from the court-room and go to his sheep and his hills. His was not the misfortune of having obstructed or injured the enlistment or recruiting service of the United States. His was the misfortune of being tried at a time when public opinion was aroused to the point of demanding conviction of everything German; when

the very name of Germany was synonymous with crime.

It is within the power of this court to right the wrong which the record shows has been done.

Respectfully submitted,

RIDGWAY & JOHNSON,
G. G. SCHMITT,
Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA,
District of Oregon,
County of Multnomah, ss.

I, Albert B. Ridgway, do hereby certify that I am one of the attorneys for Plaintiff in Error; that I prepared the foregoing Petition for a rehearing on behalf of said Plaintiff in Error; that the same is not interposed for delay, and that in my judgment said petition is well founded.

ALBERT B. RIDGWAY,
of Attorneys for Plaintiff in Error.